

In re ) Fair Hearing No. 9637  
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Appeal of )

The petitioners a twenty-one-year-old man, S.J. and his mother Mrs. J, appeal the "founding" made over four and a half years ago by the Department of Social and Rehabilitation Services (S.R.S.) of a report that the petitioner sexually abused two sisters who were in foster care in their family home. The issue is whether the report should be "expunged" in accordance with 33 V.S.A. § 686.

1. In November of 1985, SRS received a report from a thirteen-year-old girl, T.N., who had run away from a foster home operated by Mrs. J., stating that Mrs. J.'s sixteen-year-old, S.J., had forced her to have intercourse on six occasions since she had been placed there in May of 1985.

2. SRS, immediately after receiving this report decided to talk with R.B., T.N.'s 9 year-old half-sister, who had also lived in that foster home some one and a half years earlier, to determine if she had been abused as well. R.B. was questioned by her current foster mother who reported to SRS that R.B. reported being sexually abused by S.J. as well.

3. Thereafter, SRS referred both girls for an

interview with the forensic service of a university psychiatric clinic. Both girls were interviewed on November 7, 1985 by a person with an "MA" degree (who was supervised by a psychologist) and their interviews were taped and transcribed. Transcriptions of those interviews were offered into evidence to show the statements made by the girls at that time. No objection was made to their admission for that purpose.

4. The transcription of T.N.'s interview showed that T.N. was tested for her ability to remember and to tell truth from falsehood. She claims to have left her foster home due in large part to her hatred of S.J., the sixteen-year-old, and said that she "hated" him both because he raped her six or seven times and because he allegedly lied to his mother to get her in trouble. T.N.'s testimony showed that even though she was only thirteen and a half she was sexually sophisticated and had had sexual relationships with two boyfriends. She used the word "rape" and indicated that she understood what it means though she gave virtually no details of what occurred other than to say he was on top of her, used no contraceptive device, that she was unable to resist his advances because he was twice her size and that it was an unpleasant experience. The alleged rapes occurred when adults were not at home and in various rooms of the house. T.N. offered virtually no details of the events and those that she did offer were elicited through repeated specific or leading questions. The details she gave were

often contradictory. T.N. was reluctant to discuss these events other than in very general terms and her discussion contained pervasive references to her dislike for S.J. and his family. She appeared to be genuinely surprised when asked if she had talked to her sister R.B. about this event and it appeared likely she did not.

5. The transcription of nine-and-a-half-year-old R.B.'s interview showed that she also was tested with regard to her memory and ability to distinguish truth from falsehood. Unlike her half-sister's statements, R.B.'s statements were consistent and filled with detail. She clearly described an incident wherein the fifteen-year-old S.J. took her to the barn at the age of seven (after begging his reluctant mother to let her go with him to do chores) and while they were playing in the hay, pulled both their pants down and "stuck his penis" in her. She recounted their conversation, in which she complained that he was hurting her and he replied that it would not after a couple of times and she recalled that he was wearing a "rubber". She explained to the examiner that she had learned about "rubbers" from one of her mother's boyfriends. She was quite clear and consistent about where and when the event had had occurred and recounted that S.J. had tried to do the same thing in the barn on one other occasion but she ran away before he could get her. He did catch up to her and asked her to name sexual body parts and then threatened to get her into trouble with his mother if she told anyone.

She had told no one, (including her half-sister who was at that time in another home and to whom she rarely spoke) of this incident because of her fear of what might happen.

6. Both girls were asked to draw pictures of the event but T.N. declined to do so. R.B. drew a picture of a barn and two persons with a penis and vagina but not joined. She explained that she did join them because S.J. entered in but she did not know how far.

7. The forensic examiner concluded that T.N. had accurately related what happened but did not appear to be telling the whole story. It was concluded that her "credibility was colored by her anger and need for revenge."

A question was raised as to whether T.N. had at times agreed to S.J.'s sexual advances. With regard to R.B. it was noted that she was forthright, non-hesitant and appeared to have told a story that actually happened although she showed little affect.

8. On the same day as the forensic interviews, an SRS investigator who had considerable experience and a moderate amount of training in evaluating child abuse cases took charge of SRS's investigation and interviewed three other foster children, age eleven-eighteen who had been at Mrs. J.'s house. No other children reported any sexual abuse although they stated that Mrs. J.'s oldest daughter who was eighteen-years-old or an eighteen-year-old foster daughter were always left in charge when Mrs. J and her husband went out. An older child who ran away with T.N. said there had

been some sexual touching by S.J. and another foster boy but although she was friendly with T.N. she had heard nothing about a rape.

9. On November 15, 1985, the SRS investigator interviewed both girls in the presence of a police detective. No transcript is available as to the statements of R.B. but the SRS worker represented that they were the same as those made to the forensic interviewer. A transcript was available of her discussion with T.N. which lasted about forty-five minutes. That transcript showed that much more detailed answers were given. T.N. reported that shortly after she arrived at the foster home that S.J. had grabbed her breasts, pinched her buttocks and stuck a stick in her crotch while they were in a shed near the house. She reported that one evening during the summer when the foster parents were not home and one of the older children was in charge, she went dressed in her pajamas to her foster parents room where she encountered S.J. who forced her down on the bed, ripped her pajama bottoms off and forced her to have sexual intercourse with him. When asked why she did not run away, she stated that she could not because he had pinned her down with an elbow in her stomach and stated that he was much larger than she. She stated that the same thing occurred in much the same way on six or seven occasions in the evening when the foster parents were out and she was dressed for bed. The events took place in her room, other children's rooms and the

parent's bedroom. There were other younger children at home but none of them ever observed these acts because they were either sleeping or watching TV. She reported that S.J. did not use a condom but ejaculated outside of her except on one occasion. The last of these occasions occurred three days before she ran away. She states that she did not report these events to the foster mother because she did not think she would be believed, because she always believed what her son S.J. told her. In addition, T.N. reported that S.J. called her obscene names after the sex acts, and on other occasions had punched and hit her, showed her pornography and with another foster son had stripped her clothes off.

10. The SRS worker did not interview S.J. because his attorney advised him against it. The SRS worker talked with Mrs. J. to ask to interview her two younger children which Mrs. J. apparently never agreed to. During the conversation, the SRS worker said they could discuss the matter further if she wished but no meeting ever took place.

The police detective did speak with Mrs. J., but the subject of their conversation seemed to involve only the younger children's availability for an interview.

11. T.N. was described by the SRS investigator as being a small, thin girl who is adolescent, provocative and theatrical. Her public defender described her as coming from a family with a manipulative history and in the transcript with R.B. (her half-sister) there is some speculation by R.B. and T.N.'s natural mother that T.N. may

have led S.J. into the complained of behavior. R.B. herself attempted to distance herself from her half-sister T.N. whom she didn't always find credible.

12. The SRS investigator found T.N. credible as to the events and her own lack of consent and found that even though S.J. was a minor his superior age and size convinced her that his behavior was exploitive of T.N. R.B. was found credible because she did not appear to have been coached, did not attempt to slant the story to put herself in a favorable light, told the story with consistency and detail in a blunt way which showed she understood what had occurred and appeared to have had no contact with T.N. prior to telling a similar story.

13. The SRS worker concluded on the basis of her interviews with the girls and her discussion with the forensic unit that both girls had been telling the truth and founded the report on November 20, 1985.

14. Even before the SRS investigation was concluded, the foster children were removed from Mrs. J.'s home and her foster care and day care licenses were revoked. She has had no children in her care since that time. S.J., who is now twenty-one-years-old, is about to move out of her home. No information was offered as to the whereabouts of T.N. and R.B., who are now eighteen and almost fourteen, respectively.

15. Although present, S.J. made no statements with regard to the proceeding. Mrs. J., however, testified that

she was concerned that she had not been interviewed at the time of the investigation. If she had been, she would have offered that she never left the children at home without her eighteen-year-old daughter or an eighteen-year-old foster child in charge and that there were always a lot of people in the home. She also offered that T.N. was sexually precocious, provocative and that "if" anything happened with T.N. and her son it was probably consensual, and that R.B. was sexually knowledgeable as well. Because she had many teenagers in the house, some of whom had been sexually abused and were sexually precocious, she alleged that she guarded against situations where they might have had opportunities to be alone.

#### FINDINGS OF FACT

1. T.N. a thirteen-year-old girl who had run away from her foster care home, operated by Mr. J, reported to SRS that she had been raped six-seven times by Mrs. J.'s sixteen-year-old son, S.J. However, it is not reasonable to believe that she accurately reported the nature and extent of these events. According to at least three other believable and consistent reports made to SRS, there was always at least one older child and several other children in the house at all times when the rapes allegedly occurred. There was no testimony that T.N. called to any of those older children for assistance and none of those teenagers was aware of the events described by T.N. although they seemed to be keenly aware of other events including sexual

experiences in each others lives. The evidence shows that it was well-known by the SRS investigator, the public defender, T.N.'s half-sister, and T.N.'s foster and natural mothers that she was manipulative and not particularly known for telling the truth. Although she blamed the alleged rapes on her elopement from the foster home, the records clearly show that T.N. disliked her foster parents anyway and wanted to return to her mother's home, and that she seemed not to be telling the entire story. Therefore, it could not reasonably be found that the report, which was founded on T.N.'s statements alone, could have any accuracy or reliability with regard to the nature and extent of the acts.

2. R.B., T.N.'s--nine-and-a-half-year-old half-sister, reported, after questioning, and with no prior knowledge of her sister's report, that S.J. had penetrated her vagina with his penis when she had been a foster child in Mrs. J.'s home some one and a half years before and had attempted to do the same thing with no success on a later date. Unlike her sister, R.B. told her story in a simple, clear, consistent and forthright way. The act she complained of took place in a barn outbuilding which was unsupervised and unobserved and which S.J. apparently had the opportunity (on at least two occasions) to be alone with her. R.B. understood both the nature of the act performed and the purpose of the condom, which she explained was due to prior explanations given to her by her mother's boyfriend. Unlike

her sister, there was absolutely no evidence that R.B. was manipulative or lacked credibility, had any secondary motives in making such a report, had the report or the details suggested to her in any way or had made inconsistent statements. Her delay in reporting this event was due to threats made against her by S.J. and her belief that her foster mother would not believe her.

3. The SRS investigation on both reports included interviews with both girls, discussions with psychological personnel who had interviewed the girls, and interviews with other foster children. However, that investigation was incomplete in that it did not include an interview with Mrs. J. who wished to be heard on the subject. (S.J. declined to be interviewed on the advice of his lawyer) However, that deficiency was cured at the hearing where Mrs. J. had an opportunity to provide information which, in fact, corroborated discrepancies which already existed with regard to T.N. Information given with regard to R.B., however, did not refute R.B.'s claims in any way.

#### ORDER

The report of sexual abuse against the petitioner with regard to T.N. shall be expunged as being "unfounded". The report of sexual abuse against the petitioner with regard to R.B. shall not be expunged.

#### REASONS

The petitioners have made application for an order expunging the record of the alleged incidents of child

sexual abuse from the SRS registry. This application is governed by 33 V.S.A. § 686 which provides in pertinent part as follows:

(a) The commissioner of social and rehabilitation services shall maintain a registry which shall contain written records of all investigations initiated under section 685 unless the commissioner or his designee determines after investigation that the reported facts are unfounded, in which case, after notice to the person complained about, the unsubstantiated report shall be destroyed unless the person complained about requests within 30 days that the report not be destroyed. A report shall be considered to be unfounded if it is not based upon accurate and reliable information that would lead a reasonable person to believe that a child is abused or neglected.

. . .

(e) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him on the grounds that it is a unfounded or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under Section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Pursuant to this statute, the department has the burden of establishing that a record containing a finding of child abuse should not be expunged. The department has the burden of demonstrating by a preponderance of the evidence introduced at the hearing not only that the report is based upon accurate and reliable information, but also that the information would lead a reasonable person to believe that a child has been abused or neglected. 33 V.S.A. § 686(a); Fair Hearing Nos. 8110 and 8646.

Again the Board is faced with the difficulty of determining whether there is accurate and reliable

information that an event occurred when there are no eyewitnesses (other than the two involved), no physical evidence and only the statements of the two alleged child victims, this time recorded some five years ago.<sup>1</sup> To the Board falls the task, therefore, of determining how accurate and reliable the statements made by the victims were.

With regard to the younger sister, it must be found that the Department has met its burden of demonstrating by a preponderance of the evidence that her statements with regard to what occurred at Mrs. J.'s foster home are accurate and reliable. There is simply no evidence, either within her statements or outside of them, which casts any doubt on their validity. (It is certainly possible that cross-examination might have revealed some discrepancies but the petitioner did not request that opportunity.) That being the case, it must be found that her statements are credible and that those uncontroverted statements alone can form a sufficient basis for finding that the event occurred as described.

The older sister, however, did not present such a convincing case. Although the psychiatric unit personnel who interviewed her felt her statements were worthy of belief, there is much which casts doubt on their accuracy and reliability. While the younger sister's statements make it appear likely that S.J. was inclined towards the type of activity complained of, the older sister's own documented sexual precocity and manipulative behavior made it difficult

to readily believe her allegations. The record is replete with suggestions of ulterior motives, and incomplete statements as well as her inclination to exaggerate or not tell the truth. Her own testimony is filled with inconsistencies and most notably, there is little description or explanation of her attempts to avoid S.J.'s alleged advances in a house that was apparently filled with people at all times including older teenagers. In addition, her testimony suggests a desire to get revenge on Mrs. J.'s entire family because of her displeasure with them which desire introduces a possible motive for fabrication.

It is concluded then, that it was reasonable for the Department to find the statements of the younger sister accurate and reliable but was not reasonable to make that finding with regard to the older sister's statements.

The final issue to be considered is whether the Department was reasonable in finding that the activity reported amounts to "sexual abuse". The statute defines "sexual abuse" as follows:

(8) "Sexual abuse" consists of any act by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

The definition makes it clear, and the Board has so held in the past, that the term "any person" can include a

minor if it is clear that the minor was actually abusing the other child and not engaged in sexual exploration. See Fair Hearing No. 8810. SRS's "Casework Manual" sets up certain criteria for distinguishing between the two as follows:

(c) Sexual Abuse - The statutory definition is quite explicit and all-encompassing, but provides little clarity around abuse by children and by adolescents on children. The Department differentiates sexual abuse by adolescents and children from other types of sexual exploration according to the following criteria;

1. The perpetrator used force, coercion, or threat to victimize the child, or
2. The perpetrator used his/her age and/or developmental differential and/or size to victimize the child.

SRS Manual No. 1215

In the case of R.B. and S.J., there was a seven year age difference, with S.J. being an adolescent and R.B. being a relatively young child. The evidence shows that S.J. was much larger than R.B., used physical force to perform his acts, threatened to get her in trouble if she told and that she attempted to run away or resist. Based on these facts and the above criteria, it must be concluded that S.J.'s actions were more than mere exploration and could accurately be described as meeting the definition in the child protective statute of molestation and exploitation, lewd and lascivious behavior and quite possible rape, as well. Therefore, it must be concluded that the Department was reasonable in its finding that the acts committed by S.J.

constituted abuse of the child R.B.

As it has been determined that the Department most likely has a report based on accurate and reliable information with regard to R.B. which would lead a reasonable person to believe that she had been abused, the "founding" of the Department must be upheld. As the information supplied by T.N. is not found to have much likelihood of accuracy and reliability, the finding with regard to her should be expunged. As the now twenty-one-year-old S.J. apparently will no longer be residing in the home of Mrs. J., to the findings herein should pose no impediment to Mrs. J.'s reapplying for foster care or day care licenses. See Regulations for Family Day Care Homes, Section I.5.(b). Nothing herein should be construed as finding that Mrs. J. did not properly supervise the children in her care. There was no evidence presented that S.J. is interested in or will be involved in any way with day care or foster care of children. He should be aware, however, that the "finding" made by SRS will be automatically expunged in four years when R.B. turns eighteen.

#### FOOTNOTES

<sup>1</sup>The petitioners who appeared pro se, did not object to the transcript being introduced as evidence of the girls' statements of five years ago and did not request that the girls be examined under oath. Had they objected, the hearing officer may have entertained a motion to subpoena the girls themselves because of the seriousness of the allegations, the hardship to the petitioner with regard to her licenses, and the relative maturity of at one of one of the victims. However, given the fact that the petitioners waited five years to appeal, the Department may have been prejudiced if they could not rely heavily on the

transcripts. In any event, the Department should be aware that in certain contests, they may not be able to rely solely on transcribed statements.

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